

CHAPTER 17

GRIEVANCE PROCEDURE

17.1 Purpose

The purpose of the grievance procedure is to provide a fair, detailed process whereby employees may voice complaints concerning issues related to their employment with the County. The objective is to improve employee-management relations through a prompt and fair method of resolving problems.

17.2 Coverage of Personnel

- 1 All merit employees in the competitive service of the County who have satisfactorily completed their initial probationary period are eligible to file complaints under this procedure.
- 2 Excluded from the grievance procedure are the following:
 - a. Employees in the exempt service, except as specifically provided otherwise in the procedural directives for the administration of the exempt service issued by the County Executive with the approval of the Board of Supervisors pursuant to Fairfax County Code § 3-1-2(c);
 - b. Employees serving their initial probationary periods unless their complaints include allegations of discrimination as defined in Section 17.3-2d;
 - c. Sworn police employees who have elected to proceed under the "Policeman's Bill of Rights." Such employees shall be given written notification of their right to initiate a grievance under the County's Grievance Procedure. They may choose to file the grievance under either procedure, but not both.

17.3 Types of Complaints

- 1 Employee complaints will be classified at the point of grievability determination (see Section 17.5-4) as one of the following:
 - a. Grievable, with a binding decision from the Civil Service Commission;
 - b. Nongrievable but eligible for a hearing and an advisory decision from a hearing officer appointed by the Civil Service Commission;
 - c. Nongrievable with no hearing.

-2 Grievable complaints which receive binding decisions from the Civil Service Commission include:

- a. Dismissals, unsatisfactory service separations, demotions and suspensions;
- b. The application of specific County personnel policies, procedures, rules and regulations;
- c. Acts of retaliation as a result of utilization of this procedure, or of participation in the grievance of another county employee;
- d. Discrimination against an employee, including a probationary employee, on the basis of race, color, creed, religion, age, disability, national origin, sex, political affiliation, marital status or union affiliation;
- e. Intimidation because of participation or failure to participate in political activities.
- f. Acts of retaliation because the employee (i) has complied with any law of the United States or of the Commonwealth, (ii) has reported any violation of such law to a governmental authority, (iii) has sought any change in law before the Congress of the United States or the General Assembly (iv) has reported an incidence of fraud, abuse, or gross mismanagement to the Board of Supervisors Audit Committee, the Auditor to the Board, his/her department head, or to any other federal, state, or County government authority, such as the Commonwealth's Attorney for the County of Fairfax, or the U.S. Attorney for the Eastern District of Virginia.
- g. For the purpose of sub-paragraphs (c) and (f) of this section, there shall be a rebuttable presumption that increasing the penalty that is the subject of the grievance at any level of the grievance shall be an act of retaliation.

-3 Nongrievable complaints eligible to receive advisory decisions from a hearing officer appointed by the Civil Service Commission include:

- a. The physical plant;
- b. The methods and conditions of the specific job;
- c. Relations with fellow employees;
- d. Performance appraisals;
- e. Written reprimands.

17.4 Nongrievable Complaints

-1 Complaints that are not grievable under this procedure include:

- a. The establishment and revision of wages or salaries, position classification, employee benefits;
 - b. Oral reprimands;
 - c. The contents of ordinances, statutes, or established personnel policies, procedures, rules and regulations;
 - d. Failure to promote, except where the employee contends that established promotional policies or procedures were not followed or applied fairly;
 - e. Discharge, lay-off or suspension from duties because of lack of work or reduction-in-work-force, except where such actions affect an employee who has been reinstated within the previous six months by the Civil Service Commission as the result of the final determination of a grievance. In such cases, the department must show that there was a valid business reason for the action and that the employee was notified of such reason in writing prior to the effective date of the action;
 - f. Management of County employees including the right to make personnel appointments in accordance with adopted selection policies and techniques, to establish rules and regulations governing work performance and performance evaluations, to transfer and assign employees within the County, to determine the need for shift operation and rotation of the workweek, to assign overtime, to determine job training and career development, and to determine duties or actions in emergency situations.
 - g. Decisions of performance evaluation appeals panel, except in accordance with the provisions of Chapter 12.
- 2 Appeals of position classification are handled in accordance with the criteria set forth in Section 3.6.

17.5 Steps of the Procedure

-1 Step 1: Immediate Supervisor

An employee who has a complaint shall discuss the problem directly with his/her supervisor within twenty (20) business days of the date the employee should have reasonably gained knowledge of the event giving rise to the complaint.

A verbal reply by the Supervisor shall be made to the complaint during the discussion or within five business days following the meeting.

-2 Step 2: Division Supervisor

If the complaint is not resolved after the first step meeting and where there is a division supervisor, the employee may reduce the complaint to writing on "Complaint Form - Second Step." All grievance forms are obtainable from the Department of Human Resources.

The employee shall specify the relief sought through the use of this procedure. The fully completed Complaint Form shall be delivered by the employee to the division supervisor within five (5) business days of the first step meeting or the supervisor's reply, if given at a later date. The division supervisor shall meet with the employee within five business days of receipt of the Complaint Form.

A written reply by the division supervisor shall be made to the complaint within five business days following the meeting.

-3 Step 3: Department Head

If the reply from the second step meeting is not acceptable to the employee, or where no division supervisor exists, the employee may appeal the last response to the department head.

"Complaint Form - Third Step" shall be completed by the employee and delivered to the department head within five business days of receipt of the last response. The department head shall meet with the employee within five business days of receipt of the Complaint Form.

A written reply by the department head shall be made to the complaint within five business days following the meeting.

-4 Step 4: Grievability Determination

- a. When a complaint cannot be satisfactorily resolved pursuant to Steps 1 through 3 above, the employee shall request on the appropriate form a determination concerning the grievability of the complaint within ten business days of receipt of the third step reply.
- b. All requests for grievability determination shall be submitted to the County Executive. The County Executive will determine whether the employee is entitled to access to the grievance procedure and if the complaint is grievable, and if so, based upon the criteria set forth in Section 17.3, establish whether the grievant shall receive a binding or an advisory decision. Grievability and access determinations by the County Executive shall be made within ten business days of receipt of such request.
- c. Decisions regarding grievability and access are appealable only to the Fairfax

County Circuit Court. Such appeals shall be made by filing a notice of appeal with the County Executive within ten business days from the date of receipt of the decision. The County Executive, or his/her designee, shall transmit to the Clerk of the Circuit Court a copy of the County Executive's decision, a copy of the notice of appeal, and the exhibits constituting the record of the grievance within ten calendar days of receipt of the notice of appeal. A list of the evidence furnished to the County shall also be provided to the grievant.

- d. The Circuit Court shall have a hearing on the issue of grievability and/or access within thirty (30) days of receipt of the record of the grievance by the Circuit Court Clerk. The Court may affirm, reverse or modify the decision of the County Executive.
- e. The decision of the Circuit Court is final and is not appealable. Procedures governing the review by the Circuit Court are found in Virginia Code §15.2-1507(a)(9).
- f. In no case shall the County or Commonwealth's Attorney be authorized to decide the issue of grievability.

-5 Step 5: Appeal to the Civil Service Commission

- a. If the complaint has been determined to be grievable, with a binding decision or nongrievable with an advisory decision as provided herein, the employee may file a request for hearing on the appropriate form with the Fairfax County Civil Service Commission. The employee shall file the request within ten business days following the receipt of the determination that the complaint is grievable.
- b. Appeals shall be heard by the Commission or an appointed hearing officer as soon as possible after receipt of the employee's appeal request. The Commission in scheduling hearings on appeals shall give priority on its docket to dismissal and unsatisfactory service separation cases. The Commission shall notify the employee and the department head in writing of the time and place of the appeal hearing.
- c. The jurisdiction and authority of the Civil Service Commission and the hearing officer shall be confined exclusively to those complaints previously determined to be grievable as provided herein. While the Commission or the hearing officer has authority to determine the appropriate application of an existing rule or policy, they do not have the authority to add to, detract from, alter, amend or modify in any way County or department policy or procedure, and its findings shall be consistent with all applicable laws and ordinances.
- d. No member of the Civil Service Commission or an appointed hearing officer shall hear a grievance if he/she has direct involvement with the grievance being heard, or with the complaint or dispute giving rise to the grievance. The following relatives of a participant in the grievance process or a participant's spouse are prohibited from

hearing said grievance: spouse, parent, child, descendants of a child, sibling, niece, nephew and first cousin.

17.6 Remedies

- 1 The Commission is empowered to uphold or reverse the action being grieved or, in appropriate circumstances, choose a modified remedy.
- 2 In grievances entitled to a binding decision the following guidelines pertaining to remedial action shall apply:
 - a. Dismissals - The Commission may deny relief, reinstate the employee while imposing lesser disciplinary actions such as demotion or suspension, or reinstate the employee.
 - b. Disciplinary Demotions pursuant to Personnel Regulation 16.5-5 - The Commission may deny relief, impose lesser disciplinary sanctions, or revoke the disciplinary demotion.
 - c. Suspensions - The Commission may deny relief, impose a lesser suspension, instruct that a written reprimand be substituted for the suspension, or revoke the disciplinary suspension.
 - d. Unsatisfactory Service Separations - The Commission may deny relief; reinstate with a demotion to the employee's previously held class, or in the case where an employee's class is part of a class series, reinstate with a demotion to the next lower class in the series; reinstate with a new probationary period with or without a demotion; or reinstate the employee in the class he was in at time of separation.
 - e. Back Pay and Restoration of Benefits in Appeals of Dismissals, Demotions, Suspensions, and Unsatisfactory Service Separations:
 - i If an employee is reinstated, he/she shall be given back pay for the period of separation contingent upon his/her making full disclosure of all earnings he/she received during separation, which shall be an offset against back pay. In the event the employee fails to provide to the Commission such evidence as it deems necessary to determine the amount of the offset, the employee shall forfeit his/her right to back pay.
 - ii In cases of suspension, the employee shall be entitled to back pay for the period of suspension revoked by the Commission under the same conditions as sub-section (1).
 - iii A lesser sanction in dismissal cases shall include a suspension without pay covering some or all of the period of separation, notwithstanding any other provision of the Personnel Regulations.

- iv In the event that the Commission imposes a demotion in lieu of an unsatisfactory service separation or dismissal, back pay may be awarded, at the discretion of the Commission, for the period of separation at the rate of pay for the lower level classification.
- v Back pay shall be computed on the basis of the employee's regularly scheduled hours of work and shall not include any overtime that the employee might have earned.
- vi For any period of time that an employee is entitled to receive back pay, he/she shall be given service credit towards retirement and shall be reinstated in the appropriate retirement system with his/her previous plan election, provided that he/she repays into the system all contributions that he/she withdrew on separation. The employer shall ensure that all contributions and deductions attributable to such service are made.
- vii Similarly, for purposes of accruing leave, the employee shall be given credit towards his/her total years of service for any period of time that he/she is entitled to back pay. The employee shall also be credited with any leave that he/she would have accrued during that period.
- viii Upon reinstatement, the employee shall be placed in the health plan that he/she was in at the time of separation with the same options that he/she had previously elected. The effective date of coverage will be the first of the month following reinstatement. A reinstated employee may opt for retroactive coverage in the event that it would be to his or her advantage. The employee must pay his or her share of retroactive coverage premiums. Claims expenses incurred for the retroactive period will be adjusted upon payment of the premium and the employee will be reimbursed for out-of-pocket costs above those he or she will have incurred had the coverage been in effect. The employee may be reimbursed for monies expended by the employee to obtain medical insurance during the period of separation up to the amount of the employer's contribution that would have been incurred had the employee been in service during the period of separation. In no event shall the employee be entitled to reimbursement for medical costs incurred during the period of separation. In the event the employee elected to continue his or her County health insurance under COBRA during the period of separation, the employee shall be reimbursed the difference between the premium he or she paid under COBRA and what he or she would have paid had he or she continued to be employed during the period of separation. In no event shall the employee be entitled to reimbursement for medical costs during the period of separation, except as provided above.

- ix. Upon reinstatement, an employee's salary shall be adjusted to reflect any performance pay increases that would have been received had the employee not been separated. If a performance evaluation existed for the performance year prior to the employee's separation, the performance pay increase shall be determined using the final rating on that performance evaluation. If no performance evaluation existed for the performance year prior to the employee's separation, the employee shall be given a 3/5% pay increase. The performance pay increase date does not change.
- f. Promotions - The Commission may deny relief, order the promotional procedure redone, order a retroactive promotion, order the grievant promoted immediately if there is an available vacancy or promoted to the next available vacancy.
- 3 In cases other than dismissals, unsatisfactory service separations, demotions, suspensions, or performance evaluations, the Commission may deny the relief sought by the employee or grant such relief as is necessary to place the employee in the situation he/she would have been in had the Personnel Regulations or policies been properly interpreted and/or applied in the first instance. In no event shall the employee be awarded any damages, nor shall the relief granted by the Commission affect the rights of other employees.
- 4 Acts of Reprisal and Discrimination - Where the Commission determines that any act of reprisal or discrimination as defined in this chapter is the reason for the adverse employment action grieved by the employee, the Commission shall have the authority to revoke the adverse employment action. In the event the adverse employment action is one of the actions described in Sections 2 or 3 of this section, the Commission may apply the remedial actions provided under those subsections. The Commission shall also affirm such adverse employment actions taken to the extent that they were not the result of reprisal or discrimination.
- 5 Damages, Attorney's Fee and Costs - The Commission shall have no authority to order the payment of damages of the grievant's or the County's attorney's fees or costs.
- 6 Recommendations - Regardless of whether the Commission grants the individual grievant any relief, the Commission may make whatever recommendations to the Board of Supervisors or County Executive it deems appropriate.

17.7 Conduct of Grievance Step Meetings

- 1 Personal face-to-face meetings are required at all steps. The employee and the County management may have a representative present at all steps. If the employee is represented by legal counsel, management likewise has the option of being represented by counsel. The parties to the grievance may by mutual agreement waive any or all intermediate steps or meetings, with the exception of the initial complaint, reducing the complaint to writing and the request for grievability determination.

Time spent attending grievance step meetings, Circuit Court hearings or Civil Service Commission hearings during the grievant's regularly scheduled hours shall be considered work time and the use of personal leave is not required.

- 2 At all steps, appropriate witnesses also may be asked to provide information. Witnesses shall be present only while actually providing testimony.
- 3 In any complaint involving a charge of discrimination, at the request of any party to the grievance, the Director of the Office of Equity Programs, or his/her designee, may attend step meetings.

17.8 Grievant's Expenses

- 1 The grievant must bear any cost involved in employing representation or in preparing or presenting his/her case.
- 2 Whenever possible, grievances will be handled during the regularly scheduled workhours of the parties involved. Civil Service Commission hearings are held in the evenings.
- 3 The Civil Service Commission has no authority to award legal fees or punitive damages.

17.9 Extension of Time

- 1 The parties to the grievance, by mutual agreement, or the County Executive or his/her designee, upon the request of one of the parties and showing of just cause, may extend any or all of the time periods established in this procedure.

17.10 Compliance with Procedural Requirements of this Procedure

- 1 After the initial filing of a written complaint, failure of either the employee or the respondent to comply with all substantial procedural requirements of the grievance procedure without just cause shall result in a decision in favor of the other party on any grievable issue, provided the party not in compliance fails to correct the noncompliance within five workdays of receipt of written notification by the other party of the compliance violation. Such written notification by the grievant shall be made to the County Executive, or his/her designee.
- 2 The County Executive, or his/her designee, may require a clear written explanation of the basis for just cause extensions or exceptions to any of the substantial procedural requirements. The County Executive, or his/her designee, shall determine all compliance issues.
- 3 Any party aggrieved by the determination of the County Executive or his/her designee on a compliance issue may obtain judicial review of the determination by filing a petition

with the Fairfax County Circuit Court within thirty days of the compliance determination.

17.11 Resolution Prior to Hearing

Any grievance shall be considered settled at the completion of any step if all parties are satisfied. In fact, it is expected that the great majority of grievances will be settled at the first or second step. However, nothing in this procedure should be construed as limiting the employee's right to exhaust the remedies provided by this procedure.

17.12 Hearings

- 1 Hearings shall be conducted as described in Addendum 1 to Chapter 17.
- 2 Hearings shall be open to the public. However, upon request of either party, the hearing shall be private. The hearing officer or the Commission, by majority vote, may close a hearing to the public if the testimony about to be presented might impugn the personal reputation of a party or witness to said hearing, or if the right to privacy of such party or witness requires that the hearing be closed. Parties and their representatives shall be allowed to attend the hearing at all times. All witnesses shall be excluded from the hearing, except when testifying, at the request of either party.
- 3 Failure of either party without just cause to comply with all substantial procedural requirements at the hearing shall result in a decision in favor of the other party in accordance with the procedures under Pers. Reg. §17.10.
- 4 The decision shall be filed in writing by the Chairperson of the Civil Service Commission or the Hearing Officer with the parties not later than ten business days after the completion of the hearing. Copies of the decision shall be transmitted to the Human Resources Director, the employee, the employee's department head and the County Executive. The Hearing Officer also shall transmit a copy of the advisory decision to the Civil Service Commission.
- 5 The majority decision of the Commission shall be final and binding. Either party may petition the Fairfax County Circuit Court for an order requiring implementation of a binding decision from the Commission. Notwithstanding any other provision of this chapter to the contrary, a final decision of the Civil Service Commission rendered under this procedure which would result in the reinstatement of any employee of the Sheriff's Department, who had been terminated for cause, may be reviewed by the Fairfax County Circuit Court upon the petition of the County. Such review by the Circuit Court shall be limited to the question of whether the Civil Service Commission's decision was consistent with the provisions of law and written policy.
- 6 The decision of the Hearing Officer shall be advisory to the County Executive.
- 7 All decisions in the grievance procedure shall be consistent with the provisions of law

and written policy. Any challenge to the relief granted by the Civil Service Commission decision on the grounds of inconsistency with written policy shall be submitted by either party within five (5) workdays to the County Executive, or his/her designee, who is empowered to decide such questions and to direct reconsideration by the Commission, where appropriate. If the County Executive or his/her designee has a direct involvement in the grievance the decision shall be made by the Commonwealth's Attorney. Notwithstanding the above, after receipt of a Civil Service Commission decision the County Executive or his/her designee, may on his/her own action, within ten business days, remand to the Commission for further consideration a decision in which the relief granted appears to be inconsistent with written policy.

ADDENDUM NUMBER 1

PROCEDURE FOR GRIEVANCE HEARINGS AND APPEALS

Preamble

The Commission shall not be bound by Statutory or Common Law rules of pleading or evidence. Hearings will be conducted so as to ascertain the rights of the parties accurately and expeditiously.

The Hearing Officer

The Hearing Officer is an independent attorney retained by the Commission to conduct hearings on grievances which receive advisory decisions and to advise the Commission concerning legal and procedural matters in cases in which the parties are represented by counsel. The Hearing Officer does not vote on matters before the Commission and participates in its deliberations only to the extent of advising the Commission concerning legal and procedural matters. The Hearing Officer is responsible for conducting hearings in an orderly and expeditious fashion; and makes rules on evidentiary and procedural questions. The rulings are advisory and may be overturned by the Commission.

In hearings before the Civil Service Commission in which the parties are not represented by counsel, and at all prehearing conferences, the Executive Director of the Commission shall act as hearing officer.

A. Prehearing Requirements

A Prehearing Conference will be held by the Prehearing Officer prior to a hearing by the Civil Service Commission or the Hearing Officer. The following matters will be addressed:

1. Definition of the scope of the case, the specific issues to be presented to the Commission, and the specific regulations and/or ordinances allegedly violated.
2. Stipulations and agreements which will expedite the hearing are greatly encouraged, including but not limited to (1) stipulations of fact; (2) stipulations as to evidence which will be admitted without objection; (3) stipulations with respect to testimony which will be admitted in written form.
3. All exhibits and documents will be exchanged at or before the Prehearing Conference. Documents shall be marked for identification and tabbed for ease of reference. Any exhibit not provided at or before the Prehearing Conference will not be admitted as evidence, absent a showing of good cause. If as a result of the Prehearing Conference there is an outstanding request for the production of documents, such request must be complied with not later than ten calendar days prior to the date of the hearing. Any objection to the admissibility of a proposed exhibit or document shall be raised at the Prehearing Conference and if not resolved, the issue will be clearly defined by the

Prehearing Officer for consideration by the Commission or the Hearing Officer.

4. Witness lists will be exchanged at or before the scheduled Prehearing Conference. Any witness not so designated will not be permitted to testify, absent a showing of good cause. If as a result of the Prehearing Conference, there are to be deletions or additions to the witness lists, such changes will be submitted no later than ten calendar days prior to the date of the hearing. Witness lists shall include the name, address and telephone number of each witness identified and a brief statement of the substance of the expected testimony.
5. County management shall provide the Commission with copies of the grievance record prior to the hearing. A copy of the grievance record shall be provided to the grievant by County management at the same time but in no event any later than ten days prior to the hearing before the Commission.
6. The hearing date(s) will be set at the Prehearing Conference in accordance with the time estimates provided by both parties.

B. Continuances

Requests for continuances shall be in writing with a copy to the opposing party and submitted to the Civil Service Commission and/or Hearing Officer at least five workdays prior to the hearing date. The Civil Service Commission and/or Hearing Officer may grant such requests only where good cause is shown.

C. Hearing Procedure

Hearings on appeals will be heard by the Civil Service Commission or the Hearing Officer in accordance with the following order and procedures:

1. Opening statement by the moving party. (The County shall be considered as the moving party in suspensions, demotions and dismissals. In all other cases, the employee is considered to be the moving party.)
2. Opening statement by the responding party.
3. Presentation of moving party's case by direct examination.
4. Cross-examination.
5. Examination by Civil Service Commissioners or the Hearing Officer.
6. Redirect and recross examination.
7. Presentation of responding party's case by direct examination.

8. Cross-examination.
9. Examination by Civil Service Commissioners or the Hearing Officer.
10. Redirect and recross examination.
11. Presentation of rebuttal witnesses, if any, by moving party by direct examination may be presented in documentary form. Rebuttal testimony should ordinarily be included in the party's original presentation. However, rebuttal evidence may be permitted where, in the Commission's or the Hearing Officer's judgment, it is necessary to the party to rebut new material, which could not reasonably have been anticipated. The Commission or the Hearing Officer will judge the necessity of rebuttal testimony on the basis of a proffer or statement by the party seeking to introduce the rebuttal.
12. Cross-examination, examination by the Commission or the Hearing Officer, redirect and recross examination of rebuttal witnesses. If rebuttal evidence is in documentary form, provision shall be made for response by opposing party.
13. Closing statement by moving party. Proposed findings of fact and conclusions of law may be submitted at the party's option or at the request of the commission or the Hearing Officer.
14. Closing statement by responding party. Proposed findings of fact and conclusions of law may be submitted at the party's option or at the request of the Commission or the Hearing Officer.
15. The hearing record may be held open upon request of either party or upon the Commission's or the Hearing Officer's own motion for the receipt of additional exhibits or documentary evidence which in the opinion of the Commission or the Hearing Officer are necessary for a full and complete hearing. Any opposing party shall be allowed a period of ten calendar days after such receipt to respond thereto. If the Commission or the Hearing Officer finds that additional oral testimony is necessary, a hearing may be recessed for scheduling of such testimony.
16. The Commission may alter the foregoing procedures in a hearing if it deems it necessary to afford the parties a full and equal opportunity to all parties for the presentation of their evidence.

D. Record of Hearing

Recorded tapes will serve as the formal record of grievance hearings. Any party to the appeal may obtain a copy upon payment of reproduction and administrative costs.

E. Posthearing Procedures

1. Reopening Hearing

The hearing may be reopened by the Commission or the Hearing Officer at any time prior to final decision on the ground of newly discovered evidence or for other good cause shown and if the Commission or the Hearing Office finds that reopening the hearing is required for a full and true disclosure of facts or to assure that the parties receive a fair hearing in accordance with the relevant law and regulations. Petitions for reopening shall set forth the specific newly discovered evidence or other good cause, and will be granted only under exceptional circumstances. If a party files a petition for reopening the hearing, the opposing party shall file a response to said petition within five calendar days of service of the petition.

2. Reconsideration

The Hearing Officer or the Commission, upon majority vote, may reconsider a Decision prior to the actual implementation of that decision. The Commission or the Hearing Officer will only reconsider on the ground of newly discovered evidence or other good cause shown. Petitions for reopening shall set forth the specific newly discovered evidence or other good cause, and will be granted only under exceptional circumstances. Petitions for reconsideration must be filed with the Commission within five calendar days of receipt of the decision. The opposing party shall file a response to said petition within five calendar days of service of the petition.